A

MING HOLDINGS (M) SDN BHD

v.

SYED AZAHARI NOH SHAHABUDIN & ANOR

B

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
JAMES FOONG FCJ
HELILIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02-35-2007 (P)]

C

26 APRIL 2010

EVIDENCE: *Witness - Self incriminating statement in court, making of - Whether action of trial judge in cautioning witness was proper - Reasonable for trial judge to alert witness and request him to consider*

D *matter - Trial judge did not intimidate witness or force witness to withdraw any part of his testimony - Witness voluntarily withdrew impugned evidence*

EVIDENCE: *Fresh or further evidence - Appellate court's power to*

E *receive - Court of Appeal admitted impugned evidence without going through proper process - Court of Appeal fell into error of receiving evidence without complying with procedure to test probative value of evidence - Procedural unfairness to plaintiff*

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Findings*

F *of fact by trial judge - Appellate court should not reverse finding of fact by trial judge unless findings plainly wrong - Trial judge had benefit of seeing and hearing witness*

The plaintiff is a company owned by the Chan family. They held

G shares in Palmco Holdings Bhd (Palmco). The 1st defendant, his wife and the 2nd defendant (collectively referred to as the 1st defendant and his group) also held shares in Palmco. Dato Yusof Latif, his family and the company he controlled (collectively referred to as Latif and his group) also owned shares in Palmco. Palmco

H announced a special rights issue for Bumiputras in 1984. These shares were offered to the 1st defendant and his group and Latif and his group but they did not have the means to take up this special rights issue. To facilitate them, the plaintiff pledged its shares in Palmco to various banks for facilities extended to the 1st

I defendant and his group and Latif and his group. There was no written agreement regarding the loan of these shares and only memorandums of deposit were executed by the plaintiff in favour of

the banks granting the loans. The banks recalled the loans upon the defendants' default and sold the plaintiff's shares pledged to them. The plaintiff then sought the return of these shares or its value from the defendants. The defendants contended *inter alia*, that the pledge by the plaintiff was in consideration for the sale of 500,000 special rights issue allocated to the 1st defendant and his group. Since the plaintiff was not a bumiputra, the 1st defendant and his group held them on trust for the plaintiff. This contravened public policy rendering the transaction null and void. Hence the defendants need not replace the shares or its value thereof. Judgment was given in favour of the plaintiff in the High Court. The Court of Appeal reversed the decision of the trial judge and also found that the trial judge had intimidated the defendants' witness (DW1) into withdrawing his claim regarding the existence of a "pool account", from his testimony. The plaintiff was granted leave to appeal to the Federal Court on four questions namely "(i) whether any illegality could arise where no statutory requirement exists for the allotment of Bumiputra shares in a rights issue by a public company and the allotment is undertaken as a matter of policy notwithstanding the judgment of the Federal Court in *Ho Kok Cheong v. Lim Kay Tiong*?; (ii) whether the plaintiff could be barred from recovering its own shares or the value of them when/if it did not have to found its cause of action on the so-called illegality attached to the Bumiputra shares?; (iii) whether the Court of Appeal was correct in holding on the issue of facts that it was improper for the trial judge to have warned a witness of the consequences of a line of evidence that he proposed to give and to afford him an opportunity to re-think whether to proceed with the line of evidence?; and (iv) whether a party could resile at the appellate stage from a decision taken at the trial not to proffer certain evidence and whether it was open to the appellate court to reinstate the withdrawn evidence, and thereafter rely upon the same to make certain findings of fact adverse to the opposite party; whether the course adopted by the Court or Appeal has caused procedural unfairness?"

Held (allowing the appeal with costs)
Per James Foong FCJ delivering the judgment of the court:

[1] The trial judge had not acted improperly in cautioning the witness against self incrimination. Since the topic which this witness was about to testify could associate him with insider trading it was not unfair and unreasonable for the trial judge to alert the witness and request him to consider the matter. There

is no evidence that the trial judge had intimidated this witness or forced him to withdraw any part of his testimony. DW1 had sufficient time to consider before voluntarily consenting to withdraw the impugned matter and did so with the assistance of legal advice. Hence question (iii) is answered in the negative. *Amanullah Hj Ali Hasan v. Hajjah Jamilah* (paras 34, 35, 36 & 37)

[2] Once the impugned evidence was withdrawn, no party can rely on it, not even the court. Such evidence does not exist for the Court of Appeal to support its decision that since there was a pool account there must be a likelihood of a sale or arrangement of the 500,000 special rights issue. Although fresh evidence on the impugned matter can be introduced under r. 7 of the Rules of the Court of Appeal, 1994, the Court of Appeal fell into error in receiving such evidence without complying with the procedure designed to test the probative value of evidence adduced by a witness in court and this resulted in procedural unfairness to the plaintiff. Accordingly question (iv) was answered in the negative. (paras 38, 39 & 40)

[3] A trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge. Putting aside the errors committed by the Court of Appeal regarding the admission of certain evidence, the other reasons advanced were no more than just substituting one's discretion for that of another with no benefit and privilege as the trial judge had in seeing and hearing the witnesses. The findings of the trial judge are supported by cogent evidence and there is no reason why the Court of Appeal should reverse them. *Chow Yee Wah v. Choo Ah Pat*; *Civil Service Cooperative Society v. General Steam Navigation Co* (refd); *Watt or Thomas v. Thomas* (refd); *Streatham Manor Nursing Home* (refd); *Gan Yeok Chin & Anor v. Lee Ing Chin & Ors; Petroleum Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* (refd); *Re Izod*. (paras 41, 42, 43, 44, 45, 46, 47 & 48)

[4] As there was no sale or arrangement of the 500,00 special rights issue between the parties, questions (i) and (ii) are academic. Accordingly the appeal is allowed with costs here and below and the orders of the Court of Appeal are set aside and the orders of the High Court affirmed. (paras 52, 53 & 54)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif adalah sebuah syarikat yang dimiliki oleh keluarga Chan. Mereka memegang saham-saham di dalam Palmco Holdings Bhd (Palmco). Defendan pertama, isteri defendan pertama dan defendan kedua (secara kolektif dirujuk sebagai defendan pertama dan kumpulannya) juga memegang saham di dalam Palmco. Seterusnya, seorang Dato Yusof Latif, keluarga beliau dan sebuah syarikat yang dikawal oleh Dato Yusof Latif (secara kolektif dirujuk sebagai Latif dan kumpulannya) juga mempunyai saham-saham di dalam Palmco. Pada tahun 1984, Palmco telah mengisytiharkan satu terbitan saham khas bagi golongan Bumiputra. Saham-saham ini telah ditawarkan kepada defendan pertama dan kumpulannya dan Latif dan kumpulannya, tetapi mereka tidak mempunyai kemampuan untuk membeli terbitan saham khas tersebut. Maka bagi membantu mereka, plaintif telah menyandarkan saham-sahamnya di Palmco kepada beberapa bank bagi mendapatkan fasiliti-fasiliti untuk defendan pertama dan kumpulannya dan Latif dan kumpulannya. Tiada sebarang perjanjian bertulis dimeterai mengenai pinjaman saham-saham ini dan hanya memorandum deposit dimemeterai oleh plaintif untuk manfaat bank-bank yang memberi pinjaman. Bagaimanapun, apabila defendan-defendan gagal membayar balik, bank-bank telah menjual saham-saham yang disandarkan kepada mereka. Berikutnya, plaintif menuntut supaya defendan-defendan mengembalikan saham-sahamnya atau nilai yang setandingnya. Defendan-defendan antara lain berhujah bahawa sandaran oleh plaintif adalah sebagai balasan kepada penjualan 500,000 terbitan saham khas yang diagihkan kepada defendan pertama dan kumpulannya. Dan, oleh kerana plaintif bukan seorang bumiputra, maka defendan pertama dan kumpulannya memegang saham-saham tersebut untuk amanah plaintif. Ini bagaimanapun melanggari polisi awam sekaligus menjadikan transaksi tak sah dan batal. Oleh itu defendan-defendan tidak perlu mengganti saham-saham tersebut atau nilai yang setandingnya. Mahkamah Tinggi telah memutuskan dengan berpihak kepada plaintif. Keputusan hakim bicara bagaimanapun telah diakas oleh Mahkamah Rayuan, di mana mahkamah itu juga mendapati bahawa hakim bicara telah mengugut saksi defendan-defendan (DW1) untuk menarik balik dakwaannya mengenai kewujudan suatu "akaun pool", dari keterangannya. Plaintif telah memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan atas empat persoalan berikut, iaitu: (i) sama ada suatu ketaksahan boleh berbangkit dalam keadaan di mana tidak wujud keperluan statutori bagi pengagihan saham-saham Bumiputra dalam

sesuatu terbitan saham oleh sesebuah syarikat awam, dan pengagihan hanya dibuat sebagai memenuhi keperluan polisi, walaupun dengan adanya keputusan Mahkamah Persekutuan di dalam *Ho Kok Cheong v. Lim Kay Tiong*?; (ii) sama ada plaintif boleh dihalang dari mendapatkan semula saham-sahamnya atau nilai yang setanding dengannya sedangkan/dimana beliau tidak perlu mengasaskan kausa tindakannya atas ketaksahan yang kononnya terlekat pada saham-saham Bumiputra?; (iii) sama ada Mahkamah Rayuan betul dalam memutuskan atas isu fakta bahawa ianya adalah tidak wajar bagi hakim bicara untuk memberi amaran kepada saksi akan akibat-akibat dari bentuk keterangan yang hendak diberikannya dan memberikannya peluang untuk memikir semula sama ada untuk meneruskan dengan bentuk keterangannya itu?; dan (iv) sama ada sesuatu pihak boleh di peringkat rayuan menarik balik keputusan yang dibuat di peringkat perbicaraan untuk tidak mengemukakan keterangan-keterangan tertentu dan sama ada ianya terbuka bagi mahkamah peringkat rayuan untuk mengembalikan semula keterangan yang ditarik balik tersebut, dan selepas itu bergantung kepadanya untuk membuat dapatan-dapatan fakta tertentu yang memudaratkan pihak penentang; sama ada jalan yang diambil oleh Mahkamah Rayuan telah menyebabkan ketidakadilan prosedur?

Diputuskan (membenarkan rayuan dengan kos)
Oleh James Foong HMP menyampaikan penghakiman mahkamah:

[1] Hakim bicara tidaklah bertindak secara tidak wajar apabila memberi amaran kepada saksi mengenai 'self incrimination'. Oleh kerana topik yang mengenainya saksi tersebut hendak memberi keterangan boleh mengaitkannya dengan urusniaga dalaman, maka bukanlah sesuatu yang tidak adil atau tidak munasabah untuk hakim bicara menyedarkan saksi dan memintanya supaya menimbangkan perkara tersebut. Tiada keterangan bahawa hakim bicara telah mengugut saksi ini atau memaksanya untuk menarik balik mana-mana bahagian keterangannya. DW1 mempunyai masa yang mencukupi untuk menimbang sebelum secara rela bersetuju untuk menarik balik halperkara yang dicabar dan melakukannya dengan nasihat peguam. Oleh itu soalan (iii) dijawab dalam bentuk negatif. *Amanullah bin Haji Ali Hasan v. Hajjah Jamilah*.

[2] Sebaik keterangan yang dicabar ditarik balik, tiada pihak boleh terus bergantung padanya termasuk mahkamah sekalipun. Keterangan sedemikian tidak lagi wujud bagi membolehkan Mahkamah Rayuan menyokong dapatannya bahawa oleh kerana

terdapat akaun pool maka wujud kemungkinan adanya suatu penjualan atau urusan mengenai 500,000 terbitan saham khas tersebut. Walaupun keterangan baru mengenai halperkara yang dicabar boleh dikemukakan di bawah k. 7 Kaedah-Kaedah Mahkamah Rayuan 1994, Mahkamah Rayuan melakukan kesilapan dalam menerima-masuk keterangan sedemikian tanpa mematuhi prosedur yang ditetapkan bagi menguji nilai probatif keterangan yang diberi oleh seseorang saksi di mahkamah dan ini membawa kepada ketidakadilan prosedur kepada plaintif. Oleh itu, soalan (iv) di jawab secara negatif.

[3] Seorang hakim bicara mempunyai manfaat yang tidak ada pada mahkamah peringkat rayuan kerana boleh mendengar saksi-saksi dan memerhatikan tingkahlaku mereka. Oleh itu, terkecuali seorang hakim bicara itu jelas khilaf dalam dapatannya, mahkamah peringkat rayuan tidak seharusnya mengakasi dapatan-dapatan fakta yang dibuat oleh hakim bicara. Meletak ketepi kekhilafan-kekhilafan Mahkamah Rayuan berkaitan penerimaan-masuk keterangan-keterangan tertentu, alasan-alasan lain yang dikemukakan olehnya adalah tidak lebih dari mengganti suatu budibicara dengan budibicara yang lain tanpa dapat mengatasi kelebihan dan manfaat yang ada pada hakim bicara dalam melihat dan memerhati saksi-saksi. Dapatan-dapatan hakim bicara telah disokong oleh keterangan-keterangan yang kukuh, dan tiada alasan mengapa Mahkamah Rayuan harus mengakaskannya. (*How Yee Wah v. Choo Ah Pat*; *Civil Service Cooperative Society v. General Steam Navigation Co* (dirujuk); *Watt or Thomas v. Thomas* (dirujuk); *Streatham Manor Nursing Home* (dirujuk); *Gan Yeok Chin (p) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors*; *Petroleum Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* (dirujuk); *Re Izod*.

[4] Oleh kerana tiada apa-apa penjualan atau urusan terhadap 500,00 terbitan saham khas di antara pihak-pihak, maka soalan-soalan (i) dan (ii) telah menjadi akademik. Oleh itu, rayuan dibenarkan dengan kos di sini dan di bawah dan perintah-perintah Mahkamah Rayuan adalah diketepikan dan perintah-perintah Mahkamah Tinggi dikekalkan.

Case(s) referred to:

Amanullah Hj Ali Hasan v. Hajjah Jamilah Sheik Madar [1974] 1 LNS 6 HC ***(refd)***

Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***

Civil Service Cooperative Society v. General Steam Navigation Co [1903] 2 KB 756 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1986] 1 LNS 81 SC ***(refd)***

Re Izod [1898] 1 QB 241 ***(refd)***

Streatham Manor Nursing Home [1935] AC 36 ***(refd)***

Watt or Thomas v. Thomas [1947] AC 487 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 133A(1)(b)

Rules of the Court of Appeal 1994, r. 7(i)

For the appellants - Dato' Cyrus Das (Tan Swee Cheng with him); M/s Cheong Wai Meng & Van Buerle

For the respondent - Surinder Singh; M/s Ong & Manecksha

[Appeal from Court of Appeal; Civil Appeal No: P-02-962-2002]

Reported by Susheila Sreedharan

JUDGMENT

James Foong FCJ:

Introduction

[1] The background facts of this case are not disputed. They are as follows: The plaintiff is a private limited company owned by the Chan family. They held shares in a public-listed company known as Palmco Holdings Bhd (Palmco) which is listed in the Kuala Lumpur Stock Exchange. The 1st defendant, his wife and the 2nd defendant (which is a private limited company controlled by the 1st defendant) whom we shall collectively refer to as the 1st defendant and his group, also held shares in Palmco. There is another Malay gentleman by the name of Dato Yusof Latif (Latif). Like the 1st defendant, Latif, his family and the company he controlled (collectively referred to as Latif and his group) also owned shares in Palmco. Together, these three groups were the majority shareholders of Palmco and by virtue of Datuk Chan Woot Khoon, Chan Koi

Koon and Chan Fook Khoon, nominees of the plaintiff, 1st defendant and Latif, as elected directors of Palmco effectively controlled the operation of Palmco.

[2] The relationship between the Chan family, 1st defendant and Latif was good until a dispute erupted. It all began when Palmco announced a special rights issue for Bumiputras in 1984 at RM1 per share. The total special rights issue amounted to 9,640,000 shares. These shares were originally offered to Bumiputra institutions but due to the persuasive powers of the 1st defendant and Latif, the Ministry of International Trade & Industries (MITI) reversed its decision and offered them to the 1st defendant and his group and Latif and his group instead. But 1st defendant and his group and Latif and his group did not have sufficient means to take up this special rights issue. To facilitate them, the plaintiff in this instant case pledged its own fully paid-up shares in Palmco to various banks for facilities extended to the 1st defendant and his group and Latif and his group. In this instant case, the plaintiff pledged a total of 865,000 of its Palmco shares to several banks for facilities to the defendants.

[3] The defendants had used the loan facilities granted to them by the various banks to subscribe for the special rights issue allocated to them.

[4] There was no written agreement regarding the loan of these shares and neither was there any board resolution of the plaintiff approving this exercise. The only documentary evidence for this transaction were the memorandums of deposit executed by the plaintiff in favour of the banks granting the loans.

[5] The defendants serviced the loan from 1984 (the date of draw down) till 1989 when they stopped due to the economic downturn. As a result of this, the banks recalled the loans and upon default sold the plaintiff's Palmco shares pledged to them. The plaintiff is now seeking the return of these shares or its value thereof.

[6] According to the plaintiff, their Palmco shares were pledged "on the express and/or implied understanding that the said shares are to be returned to the plaintiffs by the defendants on demand". In addition, the plaintiff asserts that "It is also an express and/or implied condition that the defendants will not breach the terms and conditions of their loan agreements with their respective bankers so

as not to jeopardise the plaintiff's shares deposited with the banks". Since the defendants failed and/or neglected to return the said shares after due notice and having breached the terms and conditions of the loan agreements with the banks thereby jeopardising the said shares, the plaintiff sought:

a. An order that the 1st and 2nd defendant return a total of 2,195,000 Palmco shares.

b. Alternatively to pay for the value of these shares to be valued as at date of judgment.

c. Interest and costs.

[7] The defendants denied the plaintiff's claim and put forth the following defences:

[8] First, the pledge by the plaintiff was in consideration for the sale of 500,000 special rights issue (which was part of the 3,158,959) allocated to the 1st defendant and his group. Since these shares were allotted to Bumiputras and the plaintiff not being one, the 1st defendant and his group held them on trust for the plaintiff. This contravenes public policy rendering the entire transaction null and void. When the transaction is null and void, there is no necessity for the defendants to replace the shares or its value thereof.

[9] In the alternative, the defendants claim that the 500,000 special rights issue "was for the joint benefit of the plaintiff and defendants and the defendants held 500,000 shares on behalf of the plaintiff who deposited their Palmco shares, together with the special issues shares taken by the defendants, as security for credit facilities advanced for purchase of the special issue shares".

[10] In the further alternative, the defendants assert that since the 1st defendant and the plaintiff's directors were directors of Palmco, the pledge contravenes s. 133A(1)(b) of the Companies Act, 1965.

[11] Aside from the defence, the defendants made a counterclaim against the plaintiff for a declaration that the pledge "is contrary to public policy, illegal and void for reasons that it was done to circumvent the issuance of shares to Bumiputra and Bumiputra controlled companies".

[12] For this counterclaim, the plaintiff did not file a reply and defence to counterclaim.

High Court

[13] Judgment was given in favour of the plaintiff in the High Court on the following grounds:

[14] There was no agreement between the plaintiff and the defendants regarding the sale or arrangement for the 500,000 special rights issue.

[15] The defendants failed to call Hooi Kee Sum (Hooi), the financial controller of Palmco who had knowledge of the transaction regarding the pledge to testify on their behalf.

[16] Though the defendants had referred to a "pool account" where the plaintiff, the 1st defendant and his group together with Latif and his group would deposit their shares with the plaintiff for the purpose of transacting them, there is no documentary evidence to substantiate this.

[17] It is a fact that the defendants required the assistance of the plaintiff to pledge their shares in order for the defendants to take up the special rights issue.

[18] It is untrue that the 500,000 special rights issue was sold to or arranged with the plaintiff so that the plaintiff can control Palmco. The plaintiff, on their own, had sufficient shares to do this.

[19] The defendants were unable to identify the exact amount of their shares sold or arranged with the plaintiff and this "further adds to the disbelief of the defence story".

[20] Section 133A(1)(b) of the Companies Act 1965 is not applicable in this case as the alleged sale or arrangement took place in 1984. This provision only came into force on 1 February 1987.

[21] On the failure of the plaintiff to file a defence to the counterclaim, the declaration sought in the counterclaim is no more than a repeat of the defence. Since it is not independent of the defence, the plaintiff is excused from filing further pleadings.

[22] Having arrived at a finding that there was no oral agreement between the plaintiff and the defendants for the sale or arrangement of the 500,000 special rights issue, the High Court decided that it is unnecessary to deal with the issue of the validity of such a sale or arrangement.

Court Of Appeal

[23] The Court of Appeal reversed the decision of the trial judge and advanced the following grounds after observing "that this appeal is based purely on facts" and the "only issue is whether there was in fact an agreement made between the plaintiff and the defendant that 500,000 of the 3,158,959 Bumiputra special rights issue shares allotted to the defendant were to be given to the plaintiff as the consideration for the plaintiff's assistance in pledging its Palmco shares in favour of the banks in order to enable the defendants to obtain the bank loans to purchase the said Bumiputra rights issue shares".

[24] Regarding the lack of documentary evidence to support the defendants' claim of an oral agreement for the sale or arrangement of the 500,000 special rights issue exist, the Court of Appeal said "no sensible person would want to commit to writing a transaction which is illegal and unlawful unless the parties are completely ignorant of the law".

[25] On the adverse influence that the defendants were unable to produce documentary evidence to support the existence of a "pool account", the Court of Appeal found the trial judge had intimidated the defendants' witness (DW1) into withdrawing such claim from his testimony. As this is a principal ground for reversing the trial judge's finding, we reproduce *in extenso* what the Court of Appeal ruled.

> On our query as to why they were deleted at the court below, the counsel for Defendants (Appellants in this appeal) said they were deleted at the insistence of the learned Judge who threatened that if that part of the statement was not withdrawn he would lodge a report to the relevant authorities. Because of such insistence by the learned Judge that portion of DW1's statement was eventually deleted. Such being the scenario how then could DW1 bring evidence of the Pool Account when the learned Judge himself insisted on the deletion of the evidence pertaining to the Pool Agreement.
>
> As recorded in the notes of evidence it would appear that DW1 was initially very reluctant to delete those part of his evidence, based on the followings:
>
> Q. See Q/A 23, 24, 25 and 26. You are aware you are making defamatory statements against my client and his brother, Dato. Robert Chan.

A. I am stating a fact.

Q. I put it to you that there is no pool account or football pool account as alleged by you?

A. I don't agree. I can produce some accounts that will show the existence of those accounts.

Q. But, it is not before this Court?

A. Not at the moment.

Q. Are you confessing to this Court that you and Datuk Latif participated insider trading in Palmco shares and hereby committed a criminal offence?.

Before DW1 could give his answer to that question the Court made the insistence to delete that part of DW1's statement. Hence the hearing was adjourned to another day (8/2/02). And at the continued hearing on 8/2/02 it was recorded "By consent, counsel for the Defendants wishes to delete Q/A 23, 24, 25, 26, 27(1) and (iv) and (v), 28, 29 and 30". Before us the Counsel for the Appellants/Defendants informed us that he was forced by the learned Judge to delete those parts of DW1's statement. Such information by the Appellant's counsel was not denied by the Respondent's Counsel. We took it that it must be true.

Two things can be inferred from this episode. Firstly, the existence of such "Pool Agreement" could be true having regard to the fact that DW1 was ever willing to expose himself to a criminal action. In answer to a question by the Plaintiffs Counsel, DW1 said "I am stating a fact" and "I can produce some accounts that will show the existence of those accounts". Secondly, in the light or the Court ruling that the evidence on the "Pool Account" be deleted it would be quite obvious to us that the opportunity for DW1 to produce those accounts had been directly deprived by the order of the learned Judge. Based on DW1's answers under cross-examination and the subsequent ruling by the learned Judge it is highly improper for the learned Judge to conclude that DW1 could not produce that piece of documentary proof. The learned Judge had also seriously misdirected himself when he asked that part of DW1's statement to be deleted as that would form a relevant fact to the issue in hand. He had further made a wrong conclusion when he drew an adverse inference for DW1's failure to produce documentary evidence on the existence of the Pool Account after insisting that such evidence be deleted.

[26] On the adverse inference that the defendants did not call Hooi to testify, the Court of Appeal decided that "it would be utterly suicidal for the defendants to call Hoe (Hooi) Kee Sim to support DW1's contention knowing fully well that Hooi worked for the plaintiff's directors and he would definitely give evidence against the defendants where the nature of his answers would be purely oral and not documentary. We feel that this failure should not have been used by the learned judge as a valid ground to arrive at the conclusion which he did".

[27] The Court of Appeal then elaborated that it is reasonable to believe that the defendants did not dispose of the special rights issue to a third party at a profit when they were first allotted but instead entered into sale or arrangement with the plaintiff because "they were prepared to float and sink with the Chan family" in order "to continuously control Palmco from 1982 to 1989". Further, "it must be stressed that on the basis of the Chan family's shares only, they would not be able to be in control of Palmco".

[28] The Court of Appeal then proceeded to make a finding of fact that the plaintiff's delay in bringing this action until almost six years after their pledged shares were sold by the banks "must definitely be some form of consideration given for such generous favour involving great risk" and this consideration must be for the sale or arrangement entered with the plaintiff for the 500,000 special rights issue.

[29] As to the failure of the defendants to identify their respective amount of shares sold or arranged with the plaintiff, the Court of Appeal found that this "should not be a concern of the plaintiff so long as it (the plaintiff) receives 500,000 shares".

[30] Finally, the Court of Appeal found that since the sale or arrangement of the 500,000 special rights issue is contrary to public policy it is void without the need for the defendants to replace the pledged shares or the value thereof.

[31] Regarding the contravention of s. 133A(1)(b) Companies Act 1965 and the plaintiff's failure to file a reply and defence to the counterclaim, the Court of Appeal upheld the rulings of the trial judge on these issues.

Questions Posed

[32] Four questions were posed to this court for determination. They are:

(i) Whether any illegality could arise where no statutory requirement exists for the allotment of Bumiputra shares in a rights issue by a public company and the allotment is undertaken as a matter of policy notwithstanding the judgment of the Federal Court in *Ho Kok Cheong v. Lim Kay Tiong* [1979] 2 MLJ 224?

(ii) Whether the plaintiff could be barred from recovering its own shares or the value of them when/if it did not have to found its cause of action on the so-called illegality attached to the Bumiputra shares?

(iii) Whether the Court of Appeal was correct in holding on the issue of facts that it was improper for the trial judge to have warned a witness of the consequences of a line of evidence that he proposed to give and to afford him an opportunity to re-think whether to proceed with the line of evidence?

(iv) Whether a party could resile at the appellate stage from a decision taken at the trial not to proffer certain evidence and whether it was open to the appellate court to reinstate the withdrawn evidence, and thereafter rely upon the same to make certain findings of fact adverse to the opposite party; whether the course adopted by the Court or Appeal has caused procedural unfairness?"

Analysis

[33] The first two questions concern the issue of the legality of the sale or arrangement for the 500,000 special rights issue while the third and fourth relate to whether there was such a transaction. In our opinion it is only logical to deal with the last two questions first before returning to the first and second if the earlier questions are answered in the positive.

Question 3: Whether The Action Of The Trial Judge Was Proper

[34] Having perused the facts as disclosed, we are of the opinion that the trial judge had not acted improperly in cautioning the witness against self incrimination. The witness was the 1st defendant himself. When he was about to testify on the existence of a pool account created and subscribed to by the directors of Palmco for the

purpose of trading in Palmco shares, the trial judge issued a caution. This was appropriate since the topic which this witness was about to testify could associate him with insider trading.

This is where a director of a company, especially one which is listed in the stock exchange, in possession of confidential and privileged information, had used this to his own advantage for personal gain. This is against the law and a criminal offence. So before this witness could proceed further, the trial judge cautioned him by informing him that he may expose himself to criminal prosecution. This part of the court's proceeding which is so crucial to the accusation that the trial judge had intimidated this witness was left out by the Court of Appeal in its judgment. We now reproduce it.

> Q: Are you confessing to this Court that you and Dato Latif participated insider trading in Palmco shares and thereby committed a criminal offence?
>
> By consent, parties asked for case to be taken off tomorrow and be continued on 8/2/02 at 2.45 p.m.

[35] If this witness had elected to continue with his testimony on the insider trading, the trial judge may, as part of his duty, report the matter to the relevant authorities to investigate. This is not without precedent. In *Amanullah Hj Ali Hasan v. Hajjah Jamilah Sheik Madar* [1974] 1 LNS 6 the court made the following directions:

> The evidence so far adduced in this case shows that there was a commission of an offence connected with forgery considering my finding that the "1964 will" is in effect a false document. See section 464 third explanation of the Penal Code. But as far as I can see there should be further investigation before any criminal action can be commenced. I direct the Senior Assistant Registrar to send a copy of the proceedings in this case to the Public Prosecutor for his consideration and, if necessary, to direct further investigation and to issue a sanction to prosecute under section 129 of the Criminal Procedure Code.

[36] Saddled with such duty it was not unfair and unreasonable for the trial judge to alert the witness and request him to consider the matter. There is no evidence that the trial judge had intimidated this witness or forced him to withdraw any part of his testimony. In fact throughout the proceeding, DW1 was represented by counsel. He had independent advice. Further, this witness did not delete the

impugned paragraphs from his witness's statement immediately after the caution. He took a couple of days to consider. It was only after the trial resumed on 8 February 2002 did DW 1 voluntarily consent to withdraw the impugned statement. So he had not only sufficient time to consider but also made his decision with the assistance of legal advice.

[37] For reasons aforesaid, we answer question (iii) in the negative.

Question 4: Can The Court Of Appeal Reinstate Withdrawn Evidence And Rely On It

[38] Question (iv) relates to the impugned evidence that was deleted by DW1 from his witness statement. The Court of Appeal ruled that the trial judge had misdirected himself when he drew adverse inference on DW1's failure to produce documentary evidence to support the existence of a pool account when in truth this witness was prevented from doing so by the trial judge. As discussed, this is incorrect. The impugned evidence was not withdrawn at the insistence or threat by the trial judge. It was withdrawn voluntarily by the witness. Once this impugned evidence is absent no party can rely on it, not even the court. Such evidence just does not exist for the Court of Appeal to support its decision that since there was a pool account there must be a likelihood of a sale or arrangement of the 500,000 special rights issue.

[39] Of course, fresh evidence on the impugned matter can be introduced under r. 7 of the Rules of the Court of Appeal, 1994 (CA Rules). But this is subject to the "full discretionary power to receive further evidence by oral examination in court, by affidavit, or by disposition taken before an examiner or commissioner". see sub-r. (i) of r. 7 CA Rules. In this instance, without going through this process, the Court of Appeal has taken upon itself to criticize the trial judge and then admitted this impugned evidence without going through the process as described. What the Court of Appeal did was to question the counsel before them as to what took place in the High Court. The witness involved in this entire episode, DW1, was not even asked whether this was true. And neither was the view of the plaintiff sought. This, in our opinion is a total disregard for procedure. The Court of Appeal has fallen into the error of receiving evidence without complying with procedure designed to test the probative value of evidence adduced by a witness in court. In our considered view, this has resulted in procedural unfairness to the plaintiff where the defendants were allowed to benefit from it. This must not be allowed.

[40] Accordingly for reasons aforesaid, we answer question (iv) in the negative.

[41] Before we leave this subject and move on to the next two questions, we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge. This "plainly wrong" test has been long established and can be observed in the Judicial Committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32 where Lord Fraser said:

> In the face of that finding by the trial judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion, as the authorities already quoted show.

[42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial judge.

[43] The first is Lord Tankerton in *Watt or Thomas v. Thomas* [1947] AC 487:

> (1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court.

[44] The second is from Viscount Sankey LC in *Streatham Manor Nursing Home* [1935] AC 36, 36 who said: A

> it is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it reseeing the court. There are different meanings to be attached to the word 'rehearing'. For example the rehearing at the Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appearing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after trial before a judge alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there have been a conflict of evidence the Court of Appeal will have special regard to the fact that the trial judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co*: per Lord Shaw, 1919 S.C. (HC) 35,36, where he says: B C D E
>
> > When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to creditability or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice in the ordinary case things are much more evenly divided; witness without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in their nuance, of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed pages. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put F G H I

> himself, as I now do in this case, the question: Am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[45] The above principle is reiterated by this Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309.

[46] In relation to the instant case, based on the reasons advanced by the Court of Appeal in reversing the finding of trial judge, we are not convinced that the trial judge was plainly wrong in concluding that there was no sale or arrangement of the 5000,000 special rights issue. Even casting aside the errors committed by the Court of Appeal regarding the admission of certain evidence and focus on the other reasons advanced, we find that they are no more than just substituting one's discretion for that of another with no benefit and privilege as the trial judge had in seeing and hearing the witnesses. This should be discouraged as illustrated by Lord Halsbury in *Civil Service Cooperative Society v. General Steam Navigation Co* [1903] 2 KB 756 @ 765 (which was adopted by our Supreme Court in *Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* [1986] 1 LNS 81) who said:

> No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied.

[47] Again, the same sentiments were expressed in *Re Izod* [1898] 1 QB 241 which said:

> The Registrar had exercised her discretion vested in her and a discretion which the Court of Appeal should not interfere with, except in very exceptional and strong cases.

[48] In this instant case, the findings of the trial judge are supported by cogent evidence. They are not perverse or plainly wrong. We see no reason why the Court of Appeal should reverse them. In fact, some of the alternative findings by the Court of Appeal are not even sustainable. Instances of this are as follows:

[49] On the adverse inference taken by the Court of Appeal that the appellant took almost six years to file a claim against the defendants as an indication that the sale or arrangement for the 500,000 special rights issue exist is totally unacceptable and procedurally flawed. The plaintiff was not given a chance to explain this during the trial. No question was ever asked on this by the defendants during the trial in the High Court. In fact, this was not even an issue nor was it pleaded. The Court of Appeal just plugs this out from nowhere to support the existence of a sale or arrangement for the 500,000 special rights issue.

[50] The Court of Appeal's conclusion that it was absolutely suicidal to call Hooi to testify because Hooi works for the plaintiff and "would definitely give evidence against the defendants" is purely speculative. There is no evidence that Hooi is of such character whose testimony cannot be believed. Hooi has not even been requested to testify by the defendant nor subpoenaed to do so. In the absence of this how could this fact be verified?

[51] When the Court of Appeal ruled that it was unnecessary for the defendants to identify their respective amount of shares sold or arranged with the plaintiff so long as the plaintiff receives them the Court of Appeal did not take into account that the defendants are separate entities. Though the 1st defendant was in control of the 2nd defendant, the 2nd defendant is a private limited company which has its own identity and accountability. If each of these defendants could not specify the amount of their respective shares sold or arranged with the plaintiff then such alleged sale or arrangement could not have been concluded due to uncertainty.

Questions 1 & 2: Whether A Transaction Of The Special Rights Issue Meant For Bumiputra Is Against Public Policy And Therefore Illegal

[52] Now, we shall deal with the first and second question concerning the legality of the transaction which the defendants insist is against public policy. But in view of our opinion expressed in the earlier questions that there was no sale or arrangement of the 500,00 special rights issue between the parties, these questions are academic which do not require this court to deal with.

A

Conclusion

[53] For reasons aforesaid, we would allow this appeal with costs here and below with the deposit for this appeal to be returned to the plaintiff. The orders of the Court of Appeal should be set aside and the orders of the High Court affirmed.

B

[54] As agreed, the result of this appeal will bind Federal Court appeal number 02-34-2007 (P). Similarly the appeal in that case is allowed with costs here and below. The orders of the Court of Appeal in that case are set aside and the orders of the High Court made thereunder are affirmed.

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